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The Supreme Court and the Duty of Fair Representation

LEE M. MODJESKA*

I. INTRODUCTION

Under the National Labor Relations Act (NLRA),[1] the collective bargaining representative, selected by a majority of the employees in an appropriate unit, becomes the exclusive representative of all of the employees in the unit.[2] The common assumption that the union can represent and bind only those employees who voluntarily join the union is erroneous. National labor policy is predicated upon the principle of

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* Joseph S. Platt - Porter, Wright, Morris and Arthur Professor of Law, The Ohio State University College of Law. B.A., Antioch College, 1955; J.D., University of Wisconsin, 1960. Portions of this article had their origins in Lee M. Modjeska, *The Uncertain Miranda Fuel Doctrine*, 38 OHIO ST. L.J. 807 (1977).

1. 29 U.S.C. §§ 151-169 (1988) (Wagner Act). The National Labor Relations Act was amended in 1947 by the Labor Management Relations Act (LMRA or Taft-Hartley Act), 29 U.S.C. §§ 141-197 (1988), and again in 1959 by the Labor-Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1988). *See generally* JANICE R. BELLACE & ALAN D. BERKOWITZ, THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS (1979); ARCHIBALD COX, CASES ON LABOR LAW 8-152 (4th ed. 1958); CLARK O. GREGORY & HAROLD A. KATZ, LABOR AND THE LAW (3d ed. 1979); JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS AND THE LAW 1933-1937 (1974); JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947 (1981); DORIS B. MCLAUGHLIN & ANITA L.W. SCHOOMAKER, THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY (1979); BERNARD D. MELTZER & STANLEY D. HENDERSON, LABOR LAW CASES, MATERIALS AND PROBLEMS 1-34 (3d ed. 1985); HARRY A. MILLIS & EMILY C. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950); CLYDE W. SUMMERS & HARRY H. WELLINGTON, CASES AND MATERIALS ON LABOR LAW 326-39 (1968). *See also* Charles M. Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries, in* THE RAILWAY LABOR ACT AT FIFTY 1 (Charles M. Rehmus ed., 1977).

2. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). *See generally* George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?* 123 U. PA. L. REV. 897 (1975).

majority rule,[3] and the vote by a simple majority of the unit employees (*i.e.*, 51%) for representation commits the minority (*i.e.*, 49%) to such representation. As stated by the Supreme Court, this grant of exclusive representative status places "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers."[4]

National labor policy grants the exclusive representative awesome power over all bargaining unit employees. This policy extinguishes the power of the individual employee to order his or her employment relations with the employer, and vests this power in the union representative. Only the union may contract for the employee's wages, hours, and working conditions, and the employee is bound thereby. Employee disagreement with union bargaining decisions is legally irrelevant, for federal law does not require majority ratification of the contract.[5]

The contract negotiated between the employer and the union representative becomes the collective agreement which governs the unit, and under this principle of exclusivity, individual employment contracts must yield to the collective agreement.[6] Whether or not the individual employee might strike a better deal is irrelevant. In theory, the collective agreement reflects strength and bargaining power and thereby better

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3. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, that the bargaining representative has been given opportunity to be present at such adjustment.

NLRB v. A.J. Tower Co., 329 U.S. 324, 330-31 (1946) (elaboration of majority rule principle embodied in section 9(a)).

4. Brooks v. NLRB, 348 U.S. 96, 103 (1954). *See generally* William H. Neary, *The Union's Loss of Majority Status and the Employer's Obligation to Bargain*, 36 TEX. L. REV. 878 (1958); Joseph R. Weeks, *The Union's Mid-Contract Loss of Majority Support: A Wavering Presumption*, 20 WAKE FOREST L. REV. 883 (1984).

5. *See generally* Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984).

6. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See generally* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1426-27 (1971); Herbert Schreiber, *The Origin of the Majority Rule and Simultaneous Development of Institutions to Protect the Minority: A Chapter in Early American Labor Law*, 25 RUTGERS L. REV. 237 (1971); Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

serves the welfare of the group. The United States Supreme Court has noted that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body, both to create and to restrict the rights of those whom it represents. . . ."[7]

The union's representational exclusivity extends not only to negotiation of the basic contract, but also to all other aspects of the collective bargaining process, including administration and enforcement of the contract. In particular, the union thereby controls the grievance and arbitration procedure, and determines whether and to what extent employees may seek redress of grievances. Through its federal grant of exclusivity, the union thus controls the day to day work life of the individual.

Serious questions of constitutionality would arise were this federal grant of exclusivity unlimited. To counter such concerns, the duty of fair representation was judicially created. The Supreme Court, and later the National Labor Relations Board (NLRB), held, essentially, that the right of exclusivity carries with it the correlative statutory duty to fairly represent all employees in the bargaining unit.[8]

Over the years the duty of fair representation has become a major "part of federal labor policy,"[9] which "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."[10] The essence of fair representation doctrine was created, and continues to be shaped by the Supreme Court, and this article reviews that jurisprudential evolution.[11]

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7. Steele v. Louisville & N.R., 323 U.S. 192, 202 (1944).

8. *See* Steele v. L. & N.R., 323 U.S. 192 (1944); Teamsters (Ind.) Local 553 (Miranda Fuel Co., Inc.), 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). *See generally* Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); William P. Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965).

9. Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 78-79 (1989).

10. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

11. *See generally* Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633; Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988).

II. NATURE OF THE DUTY

A. Origins of the Doctrine - the Railway Labor Act Cases

The duty of fair representation was initially developed by the Supreme Court in a series of racial discrimination cases arising under the Railway Labor Act (RLA). In the lead case, *Steele v. Louisville & N.R.*,[12] the union was the exclusive bargaining representative of a craft unit of railroad firemen. A black minority within the unit was excluded from membership. The black employees were given neither notice nor opportunity to be heard concerning agreements negotiated by the union and the employer that substantially controlled the seniority rights of black employees and restricted their employment opportunities. Indeed, at the outset of the negotiations the union advised the employer of the union's desire to amend the contract so as ultimately to exclude all black firemen from service. The Court held that the black firemen could maintain an action, grounded in federal law, against the union for breach of the statutory duty to represent and act for all members of the craft, as well as an action against the employer who purported to act upon the basis of a proscribed agreement. Appropriate remedies for breach of the duty could include injunctive relief and damages.[13]

The Court noted that under the RLA, employees have the right to bargain through representatives of their choosing; that the majority have the right to determine the representative; that the representative bargains for working conditions applicable to the entire class of employees; and that a representative is defined, in part, as any union designated by the employees to act for them. In the Court's view, this use of the term "representative" in the statute implied that the representative must act on behalf of all of the employees it represents. The Court further noted that the Act imposes a duty upon the employer to bargain exclusively with the majority representative, and that the minority members are thus barred by the statute from choosing their own representative or from bargaining individually with the employer. Chief Justice Stone, writing for the Court, concluded that "[t]he fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its

12. 323 U.S. 192 (1944).

13. *See* Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949) (injunctive relief for breach of the duty of fair representation not barred by the anti-injunction prohibitions of the Norris-La Guardia Act).

members, the majority as well as the minority, and it is to act for and not against those whom it represents."[14] The bargaining representative's duty of equal representation was seen as at least as exacting as that imposed upon the legislature by the Equal Protection Clause of the Constitution. By thus finding an equal protection standard in the statute, the Court avoided constitutional problems.

The *Steele* Court further stated that the Act imposes upon a bargaining representative "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination."[15] While noting that a representative is not barred from making contracts that might have unfavorable effects on some of the unit employees, and that variations based on "relevant" differences (e.g., seniority, skill, type of work) are permissible, it held that "discriminations" among unit members based on the obviously irrelevant and invidious basis of race were impermissible.[16]

Steele arose in a state court. In *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*,[17] a companion case to *Steele*, the Court held that the duty of fair representation imposed by the RLA was a federal right arising under a law regulating commerce and was thus within the jurisdiction of the federal courts. The Court stated that the duty "is a federal right implied from the statute and the policy which it has adopted" and that it is "the federal statute which condemns as unlawful the [union's] conduct."[18]

Steele mandated fair representation for the entire bargaining unit. The Supreme Court thereafter extended the RLA duty of fair representation beyond minority members of the particular craft unit represented by the union. In *Brotherhood of R.R. Trainmen v. Howard*,[19] the union, exclusively representative of white brakemen, forced the employer to agree to discharge black train porters who performed the same duties as white brakemen but who had been treated by the employer and the union as a separate class for representation purposes, and who had been represented by another union. The Court held that the union's racial discrimination against noncraft members was nevertheless proscribed by the statutory duty. The Court found that the end result of the transactions involved was that the black train porters were threatened with loss of their

14. Steele v. Louisville & N.R., 323 U.S. 192, 202 (1944).

15. *Id.* at 202-03.

16. *See generally* Julia P. Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

17. 323 U.S. 210 (1944).

18. *Id.* at 213.

19. 343 U.S. 768 (1952).

jobs solely on grounds of race, that, as in *Steele*, discriminations based on race were irrelevant and invidious and unauthorized by Congress, and that "[t]he Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of power granted by a federal act."[20]

Steele applied to contract negotiations. Subsequent decisions made clear that the bargaining representative's duty of fair representation under the RLA is not confined to contract negotiations but extends to the daily administration of the contract as well, including the processing of grievances. In *Conley v. Gibson*,[21] for example, the Supreme Court held that a union could not refuse to bargain or process grievances for employees upon the basis of race. The Court rejected the proposition that the duty of fair representation comes to an "abrupt end" with the signing of the contract. Collective bargaining is a continuing process, said the Court, involving daily adjustments in the contract and work rules, resolution of new problems, and protection of contract rights. "The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."[22]

B. *Evolution of the Doctrine - Application to the National Labor Relations Act*

Steele found a federal duty of fair representation in the Railway Labor Act (RLA). The Supreme Court subsequently found the same duty in the National Labor Relations Act (NLRA). In *Ford Motor Co. v. Huffman*,[23] the union and the employer negotiated an agreement which gave pre-employment seniority credit for military service, a benefit in excess of the selective service law requirement that employees be given seniority credit for military service occurring subsequent to their employment. The plaintiff, representing a class of veteran and nonveteran employees whose seniority ran from the dates of their employment, claimed that but for the super-seniority granted by the negotiated provisions, he and others would not have been laid off or furloughed.

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20. *Id.* at 774.
21. 355 U.S. 41 (1957).
22. *Id.* at 46.
23. 345 U.S. 330 (1953).

Plaintiff contended that by negotiating these provisions, the union exceeded its authority under the NLRA.

The Supreme Court held generally, that the duty of fair representation was applicable to unions covered by the NLRA,[24] and noted particularly, that the Act reflected Congress' faith in free collective bargaining conducted by a freely and fairly chosen representative. The Court noted further that in *Steele* it had been recognized that the authority of the bargaining representative is not absolute, and that "[t]heir statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any."[25]

The duty does not preclude the representative from negotiating agreements that prefer one group over another, said the *Ford Motor* Court, as long as the differences are predicated upon "reasonable grounds of relevancy." The Court recognized that compromise is a natural incident of negotiation. The Court stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[26]

Differences in employment terms reflect many variables, said the Court, and seniority variations need not be based solely upon employment services but might well encompass time devoted to public service such as the military.[27] Finding that the pre-employment service credit was consistent with both public policy and fairness as embodied in federal selective service and veteran preference laws, and thus "within reasonable bounds of relevancy,"[28] the Court concluded that the union had the authority to accept the negotiated provisions.

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24. *See also* Wallace Corp. v. NLRB, 323 U.S. 248 (1944) (discrimination against rival union members in bargaining unit).

25. 345 U.S. 330, 337 (1953). *See also* Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), *rev'd per curiam*, 223 F.2d 739 (5th Cir. 1955) (duty applicable even where all employees in unit are union members).

26. 345 U.S. 330, 338 (1953).

27. *See* Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949).

28. 345 U.S. 330, 342 (1953).

The legitimacy of reasonable compromise was further validated by the Supreme Court in *Humphrey v. Moore*,[29] which arose in the context of an amalgamation of two separate businesses whose employees were represented by the same union. The Court held that the union did not breach its duty of fair representation by agreeing with the employer to dovetail the seniority lists. The union's action was predicated upon its view that the contract authorized the resolution. The Court found that the union "took its position honestly, in good faith and without hostility or arbitrary discrimination" and that by "choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors."[30]

The Court rejected the contention that the union could not fairly represent the antagonistic interests of the two groups of employees, stating:

> But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.[31]

C. Further Evolution - Creation of an Unfair Labor Practice

The foregoing traces judicial development of the duty of fair representation as a civil right.[32] Under the RLA and NLRA, the union, as exclusive bargaining representative, has a statutory duty to represent all employees in the bargaining unit fairly, both in collective bargaining with the employer and in enforcement of the collective bargaining agreement. A union breaches that duty when it acts against a unit employee for

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29. 375 U.S. 335 (1964).

30. *Id.* at 350.

31. *Id.* at 349.

32. *See generally* Clark, *supra* note 16; Cox, *supra* note 8; Murphy, *supra* note 8; Michael I. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962); Harry H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958). *See also* Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives From Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982).

arbitrary or discriminatory reasons, or in bad faith. Suits by an employee against a union for breach of the duty are cognizable by federal and state courts with remedies including damages and injunction.

Almost twenty years after *Steele*, the National Labor Relations Board (NLRB)[33] announced in *Teamsters (Ind.) Local 553 (Miranda Fuel Co.)*[34] the "novel, if not quite revolutionary,"[35] proposition that breach of the duty of fair representation is an unfair labor practice under the NLRA.[36] Looking to *Steele* and its progeny, the Board found that the duty of fair representation imposed upon an exclusive bargaining agent under the Act, when viewed in the context of the section 7 right of employees "to bargain collectively through representatives of their own choosing,"[37] means that section 7 "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[38] Reasoning that "[t]his right of employees is a statutory limitation on statutory bargaining representatives," the Board concluded that "[s]ection 8(b)(1)(A) of the Act

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33. The NLRB performs two distinct functions under the NLRA: (1) the prevention and remedying of unfair labor practices; (2) the determination of questions concerning employee representation (*e.g.*, elections). *See* Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); AFL v. NLRB, 308 U.S. 401 (1940); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In performing these functions the Board represents public rather than private rights. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193 (1941) (Board acts "in a public capacity to give effect to the declared public policy of the Act"); National Licorice Co. v. NLRB, 309 U.S. 350, 363 (1940) (Board proceedings "narrowly restricted to the protection and enforcement of public rights"); Amalgamated Util. Workers, 309 U.S. at 265 (Board is "a public agency acting in the public interest"). *See generally* LEE M. MODJESKA, NLRB PRACTICE §§ 1.8-1.14 (1983).

The General Counsel of the NLRB has sole authority and unreviewable discretion concerning the issuance and settlement of unfair labor practice complaints. *See* NLRB v. United Food & Commercial Workers, Local 23, 484 U.S. 112 (1987); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 687 (1965); Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987); Saez v. Goslee, 463 F.2d 214, 214-15 (1st Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972).

34. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

35. NLRB v. Miranda Fuel Co., Inc., 326 F.2d 172, 177 (2d Cir. 1963).

36. *See generally* Jeffrey M. Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547 (1963); Bernard D. Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, The Better?*, 42 U. CHI. L. REV. 1 (1974); Lee M. Modjeska, *The Uncertain* Miranda Fuel *Doctrine*, 38 OHIO ST. L.J. 807 (1977); Betty S. Murphy, *NLRB, the EEOC, and Baby Makes Three: Today's Concerns - Problems or Solutions for Tomorrow, in* N.Y.U. THIRTY-SECOND ANNUAL CONFERENCE ON LABOR 191 (Richard Adelman ed., 1979); Herbert L. Sherman, Jr., *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1964); Michael I. Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda, in* N.Y.U. SIXTEENTH ANNUAL CONFERENCE ON LABOR 3 (Thomas G.S. Christensen ed., 1963).

37. Section 7 of the National Labor Relations Act (NLRA) guarantees to employees the rights to organize and join unions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157 (1982). *See* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

38. 140 N.L.R.B. 181, 185 (1962).

accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee based upon considerations or classifications which are irrelevant, invidious, or unfair."[39]

The Board also noted in *Miranda Fuel* that while a union, as statutory bargaining representative, has obligations to employees that employers do not, employer participation in a union's arbitrary action against an employee nevertheless violates section 8(a)(1).[40] The Board

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39. *Id.* §§ 8(b)(1)(A) and 8(b)(2) of the NLRA, protect fundamental § 7 rights (*see supra* n.37) against union interference. 29 U.S.C. § 158(b)(1)(A) (1982). *See* Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981). Thus, section 8(b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of § 7 rights. *E.g.*, Pattern Makers' League v. NLRB, 473 U.S. 95 (1985) (fining strikebreaking members who have tendered resignations); Mine Workers, Local 7244 (Grundy Mining Co.), 146 N.L.R.B. 244 (1964) (assaults on uncooperative or dissident employees); NLRB v. Indus. Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968) (disciplining members for filing charges); International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961) (entering into "sweetheart" minority union contracts); *cf.* Florida Power & Light Co. v. Int'l Bhd. of Elec. Workers, Local 641, 417 U.S. 790 (1974) (fining strikebreaking supervisor-members for performing unit work); NLRB v. Drivers Local 639, 362 U.S. 274 (1960) (peaceful picketing).

Section 8(b)(2) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee to encourage or discourage union membership (*i.e.*, in violation of section 8(a)(3)). *E.g.*, NLRB v. News Syndicate Co., 365 U.S. 695 (1961); Teamsters, Local 357 v. NLRB, 365 U.S. 667 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) (union membership considerations).

40. Sections 8(a)(1) through (4) generally protect fundamental § 7 rights (*see supra* note 37) against employer interference. Thus, § 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of § 7 rights. 29 U.S.C. § 158(a)(1) (1982). *E.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 556 (1978) (broad restrictions on union solicitation and distribution of literature); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (threats of reprisal); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (promises of economic benefit); NLRB v. J.P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978) (surveillance of union meetings); Strucksnes Constr. Co., 165 N.L.R.B. 1062 (1967) (interrogation concerning union sympathies or activities).

Section 8(a)(2) makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of employee labor organizations. 29 U.S.C. § 158(a)(2) (1982). *E.g.*, International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961) ("sweetheart" recognition of minority unions); Abraham Grossman (Bruckner Nursing Home), 262 N.L.R.B. 955 (1982) (breaches of neutrality during election proceedings); Hertzka & Knowles, 206 N.L.R.B. 191 (1973), *enforcement denied*, 503 F.2d 625 (9th Cir. 1974), *and cert. denied*, 423 U.S. 875 (1975) (creation of captive company unions); Nassau & Suffolk Contractors' Ass'n, 118 N.L.R.B. 174 (1957) (undue involvement in internal union affairs).

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against an employee to encourage or discourage union membership. *E.g.*, Transportation Management Corp., 462 U.S. 393 (1983) (discharge of union activists); Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) (disproportionate discipline of union officials); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (nonpayment of accrued benefits for strikers); NLRB v. Erie Resistor Co., 373 U.S. 221 (1963) (excessive super-seniority for strikebreakers); Local 57, Int'l Ladies Garment Workers Union v. NLRB, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967) (runaway shops).

Section 8(a)(4) makes it an unfair labor practice for an employer to discriminate against an employee for filing charges or giving testimony under the Act. *E.g.*, NLRB v. Scrivener, 405 U.S. 117 (1972) (discharge for giving sworn statements to NLRB investigators); Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238 (1967) (discharge for

further concluded that a union violates section 8(b)(2), and an employer violates section 8(a)(3), when a union causes or attempts to cause an employer to derogate the employment status of an employee for arbitrary or irrelevant reasons, or because of an unfair classification.[41] Applying this set of principles in *Miranda Fuel*, the Board found that because the union caused an employee's seniority reduction in violation of the contract and pursuant to the unjustified pressure of certain union employees, the union had no legitimate union purpose and interfered with the employee's right to fair and impartial treatment.

Miranda Fuel was denied enforcement by the Second Circuit.[42] The court held that sections 8(b)(1) and (3) and 8(b)(1)(A) and (2), were violated only when the union or employer conduct is predicated upon union considerations. In the court's view, discrimination based upon

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filing charges with NLRB).

The foregoing sections, 8(a)(1)-(4) and 8(b)(1)(A) and (2) "form a web" (Scofield v. NLRB, 394 U.S. 423, 428-29 (1969)) designed to prevent employer and union intrusions upon the various employee organizational, representational, and other concerted activities protected by section 7.

41. The Board subsequently held that the duty of fair representation was included in the union's duty to bargain collectively under §§ 8(b)(3) and 8(d) of the Act. *See* Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n), 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *and cert. denied*, 389 U.S. 837 (1967) (union violated section 8(b)(3) by the contractual establishment, maintenance and enforcement of racially discriminatory work apportionment provisions).

Sections 8(a)(5) and 8(b)(3) respectively, as amplified by section 8(d), make it an unfair labor practice for an employer or union to refuse to bargain with the other in good faith concerning mandatory subjects of bargaining. 29 U.S.C. §§ 158(a)(5), (b)(3) and (d) (1982). *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). *Cf.*, Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (permissive subjects of bargaining); NLRB v. Houston Maritime Ass'n, 337 F.2d 333 (5th Cir. 1964) (illegal subjects of bargaining). *See generally* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982).

The following are illustrative of the type of conduct proscribed by sections 8(a)(5) and 8(b)(3): First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (unilateral action); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Lion Oil Co., 352 U.S. 282 (1957); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (refusal to furnish relevant information); NLRB v. Milgo Indus., Inc., 567 F.2d 540 (2d Cir. 1977) (sham bargaining); Furniture Workers v. NLRB, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964) (failure to observe statutory contract modification and termination notice and waiting period requirements); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953) (failing to reach a reasonable agreement with the union); Clear Pine Moldings, Inc., 238 N.L.R.B. 69 (1978), *aff'd*, 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981) (improperly interrogating and reprimanding employees); Case Inc. and Upper South Dept., Int'l Ladies' Garment Workers' Union, 237 N.L.R.B. 798 (1978), *aff'd in part and rev'd in part*, 653 F.2d 1091 (6th Cir. 1981); Nassau Glass Corp., 199 N.L.R.B. 476 (1972); West Coast Casket Co., 192 N.L.R.B. 624 (1971), *enforced*, 469 F.2d 871 (9th Cir. 1972) (maintaining a fixed resolve not to reach agreement); NLRB v. My Store, Inc., 147 N.L.R.B. 145 (1964), *enforcement granted in part and denied in part*, 345 F.2d 494 (7th Cir. 1965), *and cert. denied*, 382 U.S. 927 (1965).

42. Miranda Fuel, 326 F.2d 172 (2d Cir. 1963).

reasons unrelated to union membership, loyalty, acknowledgement of union authority, or performance of union obligations, was not sufficient to establish violations. Rather, there must be an intent and purpose, or a deliberate design, of encouraging or discouraging union membership. The Second Circuit concluded that the unfair labor practice machinery of the Board was "not suited to the task of deciding general questions of private wrongs, unrelated to union activities, suffered by employees as a result of tortious conduct by either employers or labor unions."[43] Notwithstanding the court's rejection, the Board has continued to apply and expand upon the Board's *Miranda Fuel* doctrine. In the Board's view, "With due deference to the circuit court's opinion, we adhere to our previous decision until such time as the Supreme Court of the United States rules otherwise."[44]

Subsequent to *Miranda Fuel*, the Supreme Court made clear in *Vaca v. Sipes*[45] that the Board's "tardy assumption of jurisdiction in these cases" does not preempt federal and state court jurisdiction over suits for breach of the duty of fair representation.[46] The Court also reaffirmed an employee's right to maintain a section 301 action in federal court against an employer for wrongful discharge in breach of contract even if the employer's conduct is arguably an unfair labor practice within the Board's

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43. *Id.* at 180.

44. Local 1367, Int'l Longshoreman's Ass'n, *supra* note 41, 148 N.L.R.B. 897, 898, n.7 (1964).

45. 386 U.S. 171, 183 (1967).

46. Under traditional labor law preemption doctrine, summarized as refined in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), the states (and the federal courts) lack jurisdiction when the activity is protected by § 7 of the NLRA or prohibited by § 8. "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244. Moreover, even where the activity is arguably, though not clearly, subject to §§ 7 and 8, the state and federal courts must defer to the exclusive primary competence of the NLRB for determination of the activity's legal status. *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978).

The federal regulatory scheme also leaves some activities and practices to be controlled by the free play of economic forces. Accordingly, a second line of preemption analysis focuses upon and preempts conduct which Congress intended to leave either entirely uncontrolled and/or immune from state (or federal court) regulation. *See* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Comm'n, 427 U.S. 132 (1976).

A third line of preemption analysis, predicated upon § 301 of the NLRA (*see infra* note 55), preempts state rules purporting to define the meaning or scope of labor contract terms, including noncontractual state rights dependent upon or intertwined with the labor contract. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

See generally Lee M. Modjeska, *Federalism in Labor Relations - The Last Decade*, 50 OHIO ST. L.J. 487 (1989).

jurisdiction.[47] (As discussed later, the union's breach of its duty of fair representation removes the exclusivity of the contractual remedy as to the employer.)[48]

A principal basis for preemption is the need to entrust primary administrative authority to the Board in order to avoid conflicting rules of law between court and Board.[49] In *Vaca*, the Court found no such basis because in the Court's view the Board was simply adopting the fair representation doctrine as it had been judicially developed. Thus, the Court found that "when the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts."[50] The Supreme Court has not yet

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47. *E.g.*, Smith v. Evening News Ass'n, 371 U.S. 195 (1962). *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). Section 301 provides that suits for violation of labor-management contracts may be brought in federal court. 29 U.S.C. § 185(a) (1988). *See generally* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

Sections 9 and 10 of the NLRA clearly vest the NLRB with jurisdiction over unfair labor practice and representation matters, whether or not such matters also involve breaches of collective bargaining agreements. *See* NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Acme Indus. Co., 385 U.S. 432 (1967). *See also* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Smith v. Evening News Ass'n, 371 U.S. 195 (1962). Section 10(a) specifically provides that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." 29 U.S.C. § 160(a) (1988). In recognition of congressional encouragement and support for private arbitration of disputes arising under labor contracts, however, the NLRB over the years generally has declined to exercise jurisdiction concerning unfair labor practice or representation questions which had been or could have been submitted to arbitration under the contract. *See* United Technologies Corp., 268 N.L.R.B. 557 (1984); Olin Corp. and Local 8-77, 268 N.L.R.B. 573 (1984). *See generally* Reginald Alleyne, *Arbitrators and the NLRB: The Nature of the Deferral Beast*, 4 INDUS. REL. L.J. 587 (1981); Michael C. Harper, *Union Waiver of Employee Rights Under the NLRA: Part II A Fresh Approach to Board Deferral of Arbitration*, 4 INDUS. REL. L.J. 680 (1981); Dennis O. Lynch, *Deferral, Waiver and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237 (1989); Calvin W. Sharpe, *NLRB Deferral to Grievance-Arbitration: A General Theory*, 48 OHIO ST. L.J. 595 (1987).

48. *E.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

49. *See generally* William C. Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEX. L. REV. 1037 (1973); Norton J. Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of* Garmon, 56 VA. L. REV. 1435 (1970); Archibald Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980); James C. Kirby, Jr., *Federal Preemption in Labor Relations*, 63 NW. U. L. REV. 128 (1968); Howard Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469 (1972); Allan H. McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959); Bernard D. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations (pts. I & II)*, 59 COLUM. L. REV. 6, 269 (1959); Frank I. Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961); Lee M. Modjeska, *Federalism in Labor Relations - The Last Decade*, 50 OHIO ST. L.J. 487 (1989).

50. 386 U.S. 171, 181 (1967). *See* Humphrey v. Moore, 375 U.S. 335, 344 (1964).

squarely passed upon the substantive validity of the Board's *Miranda Fuel* doctrine.[51]

In *Breininger v. Sheet Metal Workers International Ass'n, Local Union No. 6*,[52] the Supreme Court held that federal courts have jurisdiction over fair representation claims arising from hiring hall nonreferral. *Vaca* made clear that state and federal court jurisdiction were not preempted by the fact that breach of the duty of fair representation constituted an unfair labor practice, subject to NLRB jurisdiction, and the Board's alleged hiring hall expertise did not warrant an exception to *Vaca*. *Vaca* nonpreemption does not turn on the nature of the particular claim, said the *Breininger* Court, and "[w]e are unwilling to begin the process of carving out exceptions now, especially since we see no limiting principle to such an approach."[53]

The *Breininger* Court noted that NLRB jurisprudence extended to many areas encompassed by the duty of fair representation, and that "[a]dopting a rule that NLRB expertise bars federal jurisdiction would remove an unacceptably large number of fair representation claims from federal courts."[54] While certain state law claims arising from hiring hall arrangements and entailing tort, contract, and other substantive nonfederal law claims might be preempted, the duty of fair representation "is part of federal labor policy" and creates no substantive conflicts.[55]

The *Breininger* Court also held that fair representation claims were not delimited by unfair labor practice conduct (e.g., union-related discrimination under sections 8(a)(3) and 8(b)(2)) but rather were potentially broader in scope. Flexibility and adaptability were virtues of the doctrine in protecting employees. "The duty of fair representation is not intended to mirror the contours of § 8(b); rather, it arises

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51. *See* Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67 (1989). *See also* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 71-72, n.25 (1975); Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274 (1971).

52. 493 U.S. 67 (1989).

53. *Id.* at 76.

54. *Id.*

55. *Id. Cf.* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (state court tort action for retaliatory discharge for asserting rights under workers' compensation laws by employee covered by just cause provisions of labor contract, not preempted by federal labor contract law under § 301); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987) (state court negligence action against union, predicated upon alleged duty of care arising from labor contract's safety and working requirement provisions, preempted by § 301); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (state court tort action against employer and insurer for bad faith handling of claim under nonoccupational disability insurance plan incorporated in labor contract preempted by § 301).

independently from the grant under § 9(a) . . . of the union's exclusive power to represent all employees in a particular bargaining unit."[56]

III. THE STANDARD REFINED

Excessive judicial or administrative oversight of union judgment would intrude upon the enclaves reserved for legitimate collective bargaining and internal union affairs. Conversely, federal labor policy hardly sanctions arbitrary, capricious or discriminatory union representation. In *Vaca v. Sipes*,[57] the Supreme Court sought to refine a balanced standard for application of the duty of fair representation.

In *Vaca*, the Court made clear that union breach of the duty of fair representation is not established merely by showing union error or a meritorious grievance. There must be arbitrary, discriminatory, or bad faith union conduct. Stated differently, the fact that the employer may indeed have violated the contract and wronged the employee is not determinative.

Vaca involved an employee's state court suit alleging that the union breached its duty of fair representation by refusing to take to arbitration the employee's grievance for wrongful discharge in violation of the labor contract. The union refused to process the grievance to arbitration because in the union's view the medical evidence was insufficient to prove the employee's fitness for work. The Court stressed that there was no evidence that any of the union officers were personally hostile to the employee or that the union acted other than in good faith. The Court held

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56. 493 U.S. 67, 86 (1989). In Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527 (1989), the Supreme Court held that no private cause of action existed for federal employees against a union for breach of its duty of fair representation under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 (1988). Rather, exclusive enforcement authority over this duty was vested in the Federal Labor Relations Authority (FLRA) and its General Counsel. Because Title VII expressly makes breach of the duty of fair representation an unfair labor practice and provides for its administrative enforcement, there is no need to imply a judicial cause of action.

> We also note that *Vaca* rested in part on the fact that private collective-bargaining contracts were enforceable in the federal courts under LMRA § 301. Because unfair representation claims most often involve a claim of breach by the employer and since employers are suable under § 301, the implied fair representation cause of action allows claims against an employer and a union to be adjudicated in one action. Section 301 has no equivalent under Title VII; there is no provision in that Title for suing an agency in federal court.

Karahalios v. National Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 536 (1989).

57. 386 U.S. 171 (1967).

that because the evidence did not show that the union acted arbitrarily or in bad faith the union had not breached its duty. The Court emphasized that an individual employee has no absolute right to have a grievance arbitrated, and that breach of the duty of fair representation is not shown simply by proof that the underlying grievance may have been meritorious.

Particular note should be taken of the standard of liability applied by the state court and rejected by the Supreme Court in *Vaca*. The question that the state court regarded as dispositive of the issue of liability was whether the evidence supported the employee's assertion that he had been wrongfully discharged by the employer, irrespective of the union's good faith in taking a different view. The Supreme Court found that this standard was inconsistent with governing principles of federal law regarding a union's duty of fair representation, and that the plaintiff had failed to prove a breach of that duty. The Court made clear that the standard of liability was a much stricter one, namely, whether or not the union acted arbitrarily, discriminatorily, or in bad faith. The Court stated:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.[58]

The Supreme Court's rejection of the standard of liability applied by the state court underscores the wide discretion accorded unions. To reemphasize, the fact that the employer may have violated the contract and wronged the employee is not determinative. The threshold issue is whether or not there is arbitrary, discriminatory, or bad faith union conduct. The clear assumption is that absent such union conduct the employee will receive due process under the contractual grievance and arbitration process.

More recently, the Court made clear that mere negligence does not constitute a breach of the duty of fair representation. In *United Steelworkers of America v. Rawson*,[59] the Court held that federal labor contract law under section 301 preempted a state court negligence action alleging negligent mine inspection by the union. Whatever union duty was entailed in the allegedly negligent mine inspection arose from the

58. *Id.* at 192-93.
59. 110 S. Ct. 1904 (1990).

labor contract safety committee provisions and was governed by federal law.[60]

The Court also held that mere negligence would not support an independent fair representation claim. The duty of fair representation is an important but limited check on arbitrary union power, said the Court, for a union must be accorded a wide range of representational reasonableness. Further, no independent contractual undertaking existed to warrant a third-party beneficiary section 301 claim against the union. "If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees."[61] The instant labor contract ran between and was enforceable by the employer and the union, not individual employees. Further, the safety provisions did not even involve promises by the union to the employer, which might theoretically create third-party beneficiary rights.

Fundamental questions concerning the nature and scope of the *Vaca* standards of fair representation returned to the Court this past Term. In *Air Line Pilots Ass'n, International v. O'Neill*,[62] Continental Airlines filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. With the approval of the bankruptcy court, Continental repudiated its collective bargaining agreement with the Air Line Pilots Association, International (ALPA) and thereafter unilaterally implemented cuts in the pilots' salaries and benefits.[63] Responding to the salary cuts, ALPA called a strike, but Continental was able to continue to operate its airline by trimming its operation, by accepting 400 "cross-overs" for employment, and by hiring approximately 1,000 replacement pilots.[64]

During the period of the strike and while a lawsuit was pending against the airline,[65] Continental posted a vacancy bid which gave the pilots nine days to submit their bids for 441 future Captain and First

60. *See* Electrical Workers v. Hechler, 481 U.S. 851 (1987); Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) (tort claims intertwined with contract interpretation preempted). *See generally supra* note 55.

61. 110 S. Ct. 1904, 1912 (1990).

62. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127 (1991).

63. O'Neill v. Air Line Pilots Ass'n, Int'l, 886 F.2d 1438, 1440 (5th Cir. 1989) *rev'd*, 111 S. Ct. 1127 (1991). The concessions unilaterally implemented by Continental included cuts of more than 50% in pilots' salaries and benefits. *Id.* at 1440.

64. *Id.* Although 1,800 of the 2,000 pilots employed by Continental originally supported the strike, by August of 1985 Continental was operating with 1,600 pilots and only 1,000 pilots were still on strike. *Id.*

65. In late August of 1985, Continental notified ALPA that it was withdrawing recognition from ALPA as the authorized collective bargaining representative of the Continental pilots. ALPA responded with a lawsuit challenging the legality of the withdrawal of recognition. *Id.*

Officer positions and an undetermined number of Second Officer positions. Fearing that the vacancy bid might preclude the striking pilots from getting jobs at Continental, ALPA authorized the striking pilots to submit bids.[66] Although initially accepting bids from both groups, Continental challenged the strikers' bids in court and announced that all vacancy bid positions had been awarded to working pilots. Responding to Continental's announcement, ALPA intensified negotiations and reached an agreement with Continental which gave the pilots the option to participate in the vacancy bid positions if they would settle all outstanding claims against Continental.[67] The vacancy bid positions would then be allocated in the following manner: the first 100 Captain positions would be allocated to working pilots, the next 70 Captain positions would be allocated to first option striking workers in order of seniority, and thereafter Captain positions would be allocated on a one-to-one basis. After initial assignments, future changes in bases and equipment would be determined in the usual manner, by seniority.[68]

Several months after the settlement a group of past and present Continental pilots (the "O'Neill Group") brought an action against ALPA alleging, among other things, that ALPA had breached its duty of fair representation in negotiating and accepting the settlement.[69] ALPA then moved for a summary judgment, which was granted by the district court.[70] On appeal to the Court of Appeals for the Fifth Circuit, the summary judgment was vacated and the case was remanded.[71] Applying the *Vaca v. Sipes*[72] tripartite standard[73] and a refined definition of the "arbitrary prong,"[74] the court concluded that a jury could find that ALPA acted

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66. *Id.* at 1441.

67. *Id.* at 1441-42. Pursuant to the settlement agreement, the pilots had three options: 1) settle all outstanding claims with Continental and participate in the vacancy bid; 2) elect not to return to work and receive a lump-sum severance payment; or 3) retain outstanding claims against Continental and return to work only after first option pilots were reinstated. *Id.*

68. *Id.*

69. *Id.* at 1442.

70. *Id.*

71. O'Neill v. Air Line Pilots Ass'n, Int'l, 886 F.2d 1438, 1448-49 (5th Cir. 1989) *rev'd*, 111 S. Ct. 1127 (1991).

72. 386 U.S. 171 (1967).

73. According to *Vaca*, "[A] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

74. The court refined the arbitrary prong in the following manner by citing a prior 5th Circuit case:

> We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of these factors*; and (3) inclusive of a

arbitrarily in agreeing to a settlement that left the striking pilots worse off than a complete surrender to Continental.[75] The court reasoned that if ALPA had surrendered to all of Continental's demands, the strikers would have been entitled to the vacancy bid positions based on their seniority.[76] The court also found that the evidence raised a material issue of fact, whether the favored treatment of the working pilots under the vacancy bid allocation constituted discrimination against the striking pilots.[77] The Supreme Court granted certiorari to review the appropriate standard governing a union's duty of fair representation.[78]

Before the Supreme Court, ALPA argued that the duty of fair representation only required the union to act in good faith and in a nondiscriminatory manner.[79] ALPA attempted to distinguish *Vaca v. Sipes*, which also requires the union to act nonarbitrarily as the third prong of the tripartite standard, on the ground that *Vaca* involved contract administration or enforcement whereas the present action involved contract negotiation.[80] Relying heavily on language in *Ford Motor Co. v. Huffman*[81] that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion,"[82] ALPA argued that no substantive review of settlement terms is permissible where the union has acted in good faith and with honesty of purpose.[83] ALPA also argued that a union owes no enforceable duty of adequate representation because employees are protected from inadequate representation by removing union officials through the union political process.[84]

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fair and impartial consideration of the interests of all employees.

O'Neill v. Air Line Pilots Ass'n, Int'l, 886 F.2d 1438, 1444 (5th Cir. 1989) (citing Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976) (emphasis added)).

75. *Id.* at 1448-49.

76. *Id.* at 1445-46.

77. *Id.* at 1446-47.

78. Air Line Pilots Ass'n, Int'l, v. O'Neill, 111 S. Ct. 1127 (1990).

79. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1133 (1991).

80. *Id.* at 1135. *Cf.* Dement v. Richmond, Fredericksburg and Potomac R.R. Co., 845 F.2d 451 (4th Cir. 1988) (under the Railway Labor Act, union conduct in negotiating a labor contract should be subjected to a lesser standard of review in regard to the duty of fair representation); Schultz v. Owens-Illinois, Inc., 696 F.2d 505 (7th Cir. 1982) (court recognizes two separate standards in fair representation cases and permits a wide range of reasonableness in contract negotiation cases).

81. 345 U.S. 330 (1953).

82. *Id.* at 338.

83. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1133 (1991).

84. *Id.* at 1134.

Although accepting the general principle that courts should allow the private parties to establish the terms of their private agreement, the Supreme Court stated that an examination of the terms is required to "search for evidence that a union did not fairly and adequately represent its constituency."[85] Analogizing the union's duty of fair representation to that of a legislature,[86] the Court noted that even a legislature is subject to some judicial review of the rationality of its action. The Court concluded that the appropriate level of review in the duty of fair representation context was the *Vaca v. Sipes* tripartite standard, thus rejecting the ALPA's argument that the "arbitrary prong" did not apply to unions in the contract negotiation stage.[87] Under *Vaca*, the union, as the exclusive bargaining agent for the employees, is required to serve the interests of all members "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[88] The Court rejected a contract administration/negotiation distinction because none of their prior decisions had suggested that contract negotiation should be measured by a lesser standard. Moreover, the difficulty of establishing a bright line between contract administration and contract negotiation weighed against using a double standard.[89]

Turning to the refinement of the "arbitrary prong" employed by the court of appeals, the Court rejected the refinement because it authorized more judicial review of the substantive terms of private agreements than is consistent with national labor policy.[90] Moreover, the Court found that the court of appeals' approach failed to take into account either the strong policy favoring the peaceful settlement of labor disputes

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85. *Id.* at 1133.

86. *Id.* at 1134. The Court also analogized the duty of fair representation to the duty owed by a fiduciary to its beneficiaries, to the relationship between the attorney and client, and to the responsibilities of corporate officers and directors toward shareholders. Drawing on this analogy, the Court stated that "[j]ust as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith." *Id.*

87. *Id.* at 1135.

88. Vaca v. Sipes, 386 U.S. 171, 177 (1967).

89. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1135 (1991). The Court stated that "[w]e doubt . . . that a bright line could be drawn between contract administration and contract negotiation. Industrial grievances may precipitate settlement negotiations leading to contract amendments, and some strikes and strike settlement agreements may focus entirely on questions of contract interpretation." *Id.* The Court also noted that certain union activities such as operating a hiring hall would not fall into either category. *Id. But cf.* Dement v. Richmond, Fredericksburg and Potomac R.R. Co., 845 F.2d 451 (4th Cir. 1988) (under the Railway Labor Act, union conduct in negotiating a labor contract should be subjected to a lesser standard of review in regard to the duty of fair representation); Schultz v. Owens-Illinois Inc., 696 F.2d 505 (7th Cir. 1982) (court recognizes two separate standards in fair representation cases and permits a wide range of reasonableness in contract negotiation cases).

90. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1135 (1991).

or the importance of evaluating the union's decision in light of the legal and factual climate present at the time of the negotiation. Clarifying the "arbitrary prong," the Court stated that "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'"[91]

Applying the *Vaca* tripartite standard, the Court concluded that ALPA's negotiation of the settlement agreement was well within the wide range of reasonableness allowed in the bargaining process, even assuming that the union made a bad settlement.[92] The Court based this conclusion on the legal and factual climate existing at the time of the settlement. At that time, Continental had announced that all vacancy bid positions would be awarded to nonstriking pilots. In addition, although the court of appeals determined that the positions were still vacancies even after the Continental announcement, the Court stated that the law was unclear about whether striking pilots had a right to the positions based on seniority.[93] Given the background of Continental's resistance during the strike, the Court found it rational for ALPA to conclude that a voluntary return to work would precipitate more litigation over the vacancy bid positions. Furthermore, the settlement provided prompt access to a share of new jobs, avoided the costs and risks of major litigation, and provided a presumably more advantageous result than a complete surrender to Continental's pre-settlement terms for those pilots choosing the lump-sum severance payment.[94]

The Court also rejected the breach of duty argument based on discrimination between striking and working pilots. The Court reasoned that, assuming that the acceptance of the settlement agreement was rational, some form of allocation was inevitable.[95] Moreover, unlike the

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91. *Id.* at 1136.

92. *Id.* For purposes of its analysis, the Court assumed that the court of appeals was correct in concluding that if ALPA had surrendered to Continental's pre-settlement terms, the striking pilots would have been entitled to reemployment in the order of seniority. Therefore, the Court assumed that ALPA made a settlement which was even worse than a unilateral termination of the strike. *Id.* at 1136.

93. *Id.* The court of appeals determined that the positions were still vacancies based on a separate lawsuit in which a federal district court had ruled that the bid positions were still vacancies until pilots were trained and actually working in the positions. The Court questioned the validity of this ruling, because it was being challenged on appeal. The Court also questioned the court of appeals' conclusion that the striking pilots had a right to the bid vacancies based on their seniority because the court of appeals had relied solely on National Labor Relations Act cases. The Court stated that "[w]e have made clear, however, that National Labor Relations Act cases are not necessarily controlling in situations, such as this one, which are governed by the Railway Labor Act." *Id.* at 1137.

94. *Id.*

95. *Id.*

grant of super-seniority in *NLRB v. Erie Resistor Corp.*,[96] the settlement agreement did not permanently alter the seniority system. Therefore, the Court found that ALPA had not breached its duty of fair representation.[97]

IV. SPECIAL PROCEDURAL AND REMEDIAL CONSIDERATIONS

A. The Hybrid Lawsuit

An employee is normally bound by the grievance and arbitration procedures of the collective bargaining agreement as to grievances covered by that agreement. Any arbitration award (or pre-arbitration resolution) arising out of the contractual process is normally final and binding. The exclusivity of the contractual remedy therefore bars an independent action (*i.e.*, section 301) against the employer for breach of contract. The contractual process does not, of course, bar an independent action or unfair labor practice charge against the union for breach of the duty of fair representation. An employee's independent action against the employer under section 301 for breach of contract is not barred by the otherwise exclusive contractual remedy where that contract procedure has been tainted by the union's breach of its duty of fair representation.[98]

As a general precondition to such hybrid lawsuits, the employee must thus exhaust (or attempt to exhaust) contractual grievance and arbitration procedures.[99] Further, the employee must also exhaust any internal union review procedures which could reactivate the grievance or award complete relief.[100] Preliminary judicial determination of the question of the union's breach of its duty is then, frequently required before the section 301 suit against the employer can proceed.[101] Thus, whether or not the union is joined in the suit, the employer is often in the somewhat anomalous position of defending the union's conduct.

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96. 373 U.S. 221 (1963). While ALPA's settlement agreement "preserved the seniority of the striking pilots after their initial reinstatement[,] [i]n *Erie*, the grant of extra seniority enabled the replacement workers to keep their jobs while more senior strikers lost theirs during a layoff subsequent to the strike." Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1137 (1991).

97. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S. Ct. 1127, 1137 (1991).

98. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

99. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

100. *See* Clayton v. International Union, United Automobile Workers, 451 U.S. 679 (1981).

101. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

Nor is suit against the union barred by failure to allege an employer breach of the labor contract. *Breininger v. Sheet Metal Workers International Ass'n, Local Union No. 6*,[102] made clear that while a substantial jurisprudence has developed concerning hybrid fair representation/breach of contract claims where the employee elects to sue both employer and union,[103] nothing in that jurisprudence requires that an independent fair representation claim contain a concomitant claim of employer breach. Similarly, potential bifurcation of claims between court and NLRB does not diminish independent federal jurisdiction under 28 U.S.C. § 1337(a) for the fair representation claim which arises from the NLRA grant of exclusive representational status. Further, bifurcation does not give the NLRB exclusive jurisdiction over "any fair representation suit whose hypothetical accompanying claim against the employer might be raised before the Board."[104]

The six-month unfair labor practice charge limitations period of section 10(b) of the NLRA applies to section 301 employee suits against the employer for breach of contract, or against the union for breach of the duty of fair representation.[105] Departure from state limitations periods is deemed appropriate since federal law provides a closer analogy, and the federal policies at stake and practicalities of litigation make that rule "a significantly more appropriate vehicle for interstitial lawmaking."[106]

B. Apportionment of Damages

We have seen, in *Vaca v. Sipes*,[107] that the Supreme Court continued to subject union representational conduct to judicial scrutiny, but simultaneously placed substantive and procedural limitations on the scope of that review. *Vaca* further circumscribed union exposure under the duty of fair representation by making clear that the union is not required to pay the employer's share of the damages.

In the typical situation, the employer triggers the controversy by breaching the contract, and the union aggravates the problem by breaching

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102. 493 U.S. 67 (1989).

103. *See infra* pp. 13-14.

104. 493 U.S. 67, 84-85 (1989).

105. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). *See* West v. Conrail, 481 U.S. 35 (1987) (service need not occur within six-month limitations period). *Compare* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (section 301 suits generally governed by state statutes of limitations). *See generally* Daniel G. Gallagher & Peter A. Veglahn, *The Statute of Limitations Period in Duty of Fair Representation Cases: A Clarification*, 38 LAB. L.J. 776 (1987).

106. 462 U.S. 151, 172 (1983).

107. 386 U.S. 171 (1967).

its duty to fairly process the grievances. *Vaca* held generally that liability is to be apportioned between the employer and union according to the damage caused by their respective fault. "Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance, should not be charged to the employer."[108] Applying these principles to the wrongful discharge situation in *Vaca*, the Court found that the union's failure to resort to arbitration did not exempt the employer from full contractual damages. Assuming the union breached its duty, all or almost all of the employee's damages were attributable to the wrongful discharge. Accordingly, a damage award against the union was improper.

Subsequently, however, in *Bowen v. United States Postal Service*,[109] the Supreme Court held that a union may be held primarily liable for that portion of a wrongfully discharged employee's damages caused by the union's breach of its duty of fair representation.[110] *Bowen* warrants extended discussion here, for it graphically illustrates the somewhat convoluted operation of the duty of fair representation. The trial court found that the employee was discharged without just cause, and that the union had handled the apparently meritorious grievance in an arbitrary and perfunctory manner; that both the union and the employer acted in reckless and callous disregard of the employee's rights; that the employee could not have proceeded independently of the union; and that the employee would have been reinstated had the union arbitrated the grievance. The trial court ordered that the employee be reimbursed $52,954 for lost benefits and wages. The trial court approved the jury's apportionment whereby the union was responsible for $30,000 of the employee's damages, and ordered the employer to pay the remaining $22,954.

In explaining to the jury how liability might be apportioned, the trial court indicated that the jury equitably could base apportionment on the date of a hypothetical arbitration decision, the date when the employer would have reinstated the employee if the union had fulfilled its duty. The trial court suggested to the jury that the employer could be liable for damages before that date and the union could be liable for damages thereafter. The employee was discharged on March 13, 1976. The trial

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108. *Id.* at 197-98.

109. 459 U.S. 212 (1983).

110. *See generally* Lea S. VanderVelde, *Making Good on Vaca's Promise: Apportioning Back Pay to Achieve Remedial Goals*, 32 UCLA L. REV. 302 (1984). *See also*, Richard Kirschner & Martha Walfoort, *The Duty of Fair Representation: Implications of Bowen*, 1 THE LAB. LAWYER 19, 31-37 (1985).

court found that if the grievance had been arbitrated, the employee would have been reinstated by August 1977, and lost wages after that date were thus deemed the fault of the union. The trial court acknowledged that while the employer had set the case in motion by the discharge, the union's actions upon which the employee reasonably relied delayed the reinstatement, and it was thus a proper apportionment to assign fault to the union for approximately two-thirds of the period the employee was unemployed until the time of trial.

The Supreme Court held that apportionment of the damages was required by *Vaca*, in light of the trial court's findings that the damages sustained by the employee were caused initially by the employer's unlawful discharge and were increased by the union's breach of its duty of fair representation. The Court did not decide whether the trial court's instructions or its apportionment of damages were proper, because the union objected to the instructions solely on the ground that no back pay at all could be assessed against the union. Nor did the Court consider whether there were degrees of fault, since both the employer and the union were found to have acted in reckless and callous disregard of the employee's rights.

The dominant concern, said the Court, is the injured employee's right to be made whole because of both the employer's and union's breach. While the employer should not be shielded from the natural consequences of its action because of the union's wrongful conduct, the union's breach of its duty and not employer fault precluded remedial action through the grievance procedure. "The fault that justifies dropping the bar to the employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach. To hold otherwise would make the employer alone, liable for the consequences of the union's breach of duty."[111]

The *Bowen* Court noted *Hines v. Anchor Motor Freight, Inc.*,[112] where it had held that a union's breach of the duty of fair representation would remove the bar of finality from an arbitral decision, in part because a contrary rule would preclude employee recovery even where the union had corrupted the arbitration process.

> It would indeed be unjust to prevent the employee from recovering in such a situation. It would be equally unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct. It is true that the employer discharged the employee wrongfully and remains liable for the

111. 459 U.S. 212, 222 (1983).
112. 424 U.S. 554 (1976).

> employee's backpay. . . . The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages.[113]

The *Bowen* Court found that apportionment of the damages would increase the incentive for both parties to comply with the grievance procedure, noting that a contrary rule of total employer liability might affect the willingness of employers to agree to common arbitration clauses. The Court found that apportionment would not impose on the union a burden inconsistent with national labor policy, but rather "will provide an additional incentive for the union to process its members' claims where warranted. . . . This is wholly consistent with a union's interest. It is a duty owed to its members as well as consistent with the union's commitment to the employer under the arbitration clause."[114] The Court noted further that an award of compensatory damages will normally be limited and finite, and that the union's exercise of discretion is shielded by the standards requisite to proof of a breach of the duty of fair representation.

C. Other Remedial Considerations

The Supreme Court has held that punitive damages may not be awarded for breach of the duty of fair representation.[115] Punitive damage awards could deplete union treasuries, as well as compel unions to process frivolous claims or resist fair settlements. The fundamental purpose of unfair representation suits is compensatory.

In *Teamsters, Local 391 v. Terry*,[116] the Court held that the Seventh Amendment entitled employees to a jury trial on their claim for compensatory damages (lost wages and health benefits) against their union for breach of the duty of fair representation. (The claim arose from special seniority agreements for drivers involved in a series of layoffs and recalls and the union's declination to process certain grievances to the grievance committee level on the ground that the issues were determined in prior committee proceedings.) While the search for an historic analog reveals a fair representation claim is both legal and equitable in nature,

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113. 459 U.S. 212, 222 (1983).
114. *Id.* at 227-28.
115. International Bhd. of Electrical Workers v. Foust, 442 U.S. 42 (1979).
116. 494 U.S. 558 (1990).

the particular money damages remedy is legal in nature. The back pay sought was neither restitutionary nor incidental to injunctive relief, but represented wages and benefits otherwise due from the employer, not money wrongfully withheld by the union. Back pay relief under Title VII of the Civil Rights Act of 1964,[117] which the Court has characterized as equitable,[118] was distinguishable since such back pay was specifically deemed "equitable relief" by Congress and was restitutionary in nature. (The Court assumed, but did not decide, that Title VII plaintiffs are not entitled to jury trials.) NLRA back pay relief was also distinguishable since the duty of fair representation concerns individual not public wrongs and therefore "vindicates different goals."[119]

V. APPLICATION OF THE DOCTRINE

Steele-Vaca spawned a host of progeny, and fair representation cases became over time a predominant aspect of federal labor law litigation.[120] While the focus of this article is Supreme Court jurisprudence, discussion may be informed if not sharpened by a brief overview of fair representation issues which have occupied the federal courts.[121]

Consistent with the early Railway Labor Act (RLA) cases such as *Steele*, the courts have consistently held that union action predicated upon racially discriminatory (or other invidious) motivation constitutes a breach of the duty of fair representation. Union misrepresentation rooted in sex discrimination is equally unlawful. The courts have held that unions breach their duty of fair representation in a variety of situations where the unions' actions are essentially based upon or in retaliation against

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117. 42 U.S.C. § 2000(e) *et seq.* (1982).

118. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-18 (1975).

119. Chauffers, Teamsters and Helpers, Local No. 391 v. Terry, 110 S. Ct. 1339, 1349 (1990).

120. *See generally* Mayer G. Freed, Daniel D. Polsby & Matthew L. Spitzer, *Unions, Fairness and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983); THE DUTY OF FAIR REPRESENTATION (JEAN T. MCKELVEY ed. 1977); THE CHANGING LAW OF FAIR REPRESENTATION (Jean T. McKelvey ed. 1985); Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFFALO L. REV. 89 (1985); David L. Gregory, *A Call for Supreme Court Clarification of the Union Duty of Fair Representation*, 29 ST. LOUIS L.J. 45 (1985); Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1212 (1985); Lea S. VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983); Jonathan S. Willett, *Evolving Standards for Duty of Fair Representation Cases Under Section 301*, 62 DEN. L. REV. 627 (1985).

121. For compilations of cases reflecting this overview see CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 1319-1343 (2d ed. 1983) and 3D SUPP. 480-83 (1982-86).

statutorily protected employee activities. Thus, for example, the union may not base its action upon such irrelevant or invidious considerations as the unit employee's nonmembership in the union, the unit employee's intraunion activity, nor the unit employee's having filed charges with the National Labor Relations Board (NLRB) or other agencies. The courts have also held that a union breaches its duty of fair representation when its discriminatory actions are predicated upon the basis of political expediency. Principles of bargaining unit majority rule do not defeat the duty of fair representation. Unexplained union action has also been found unlawful.

While a union may lawfully exercise reasonable discretion in refusing to pursue a grievance, once the union undertakes the case, the union must act fairly as the grievant's advocate. The duty is deemed analogous to that between legislator and constituent rather than attorney and client. A union breaches its duty of fair representation when it handles a grievance in a perfunctory manner. When a union summarily accepts an employer's uncorroborated assertions or shifting employer reasons concerning a grievant's conduct, for example, fails to consult with the grievant, or fails to investigate and consult with the employer concerning a grievance, the union's conduct is found to be perfunctory.

As already noted, the Supreme Court recently endorsed the prevailing view that mere negligence is not a breach of the duty of fair representation.[122] Intentional misconduct, however, clearly violates the duty of fair representation. Deliberate concealment of material facts, for example, is clearly regarded as inconsistent with the duty. Aggravated or gross negligence, gross mistake, or reckless disregard, may in particular circumstances violate the duty.

VI. REFLECTIONS ON THE DOCTRINE

The foregoing exegesis discloses that while the Supreme Court has subjected union representational conduct to judicial scrutiny, it has simultaneously placed significant procedural and substantive limitations upon the scope of that review. Generally, as a precondition to any suit against the employer for breach of contract, the employee must exhaust (or attempt to exhaust) contractual grievance and arbitration procedures. That dispute resolution process (*i.e.*, arbitration award) will normally be

122. United Steelworkers of America v. Rawson, 110 S. Ct. 1904, 1907 (1990).

final and binding,[123] and will preclude an independent suit by the employee against the employer. The employee's suit is not barred by the exclusive contractual procedures, however, where the union has breached its duty of fair representation.[124]

Further, union breach of the duty of fair representation, which would remove the exclusivity of the grievance and arbitration procedure and open the employer to court suit, is not established merely by showing union error or a meritorious grievance. There must be arbitrary, discriminatory, or bad faith union conduct. Stated differently, the fact that the employer may indeed have violated the contract and wronged the employee is not determinative. And, that proposition is often a hard pill to swallow.

The following hypotheticals, reflective of daily labor relations practices, highlight some of the significant boundaries and limitations of fair representation doctrine:

(a) the union agrees the grievance is meritorious but declines to investigate, process or arbitrate the grievance because of inadequate funds (fair);

(b) the union agent agrees to process the grievance, completes the grievance form, but forgets to file the grievance within contractual time periods (fair);

(c) the union declines to arbitrate a sexual harassment grievance after a majority of unit employees vote against further arbitration of any such claim (fair);

(d) the union declines to arbitrate after a majority of unit employees decide the grievance lacks merit (probably unfair);

(e) prior to arbitration of a discharge, the union and the employer privately advise the arbitrator that grievant is a "bad apple" whom neither

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123. The Court has long held that (1) courts should order arbitration absent positive assurance that the arbitration clause does not cover the particular dispute; (2) arbitrators, not courts, are to decide the merits of grievances; (3) courts are not to review the merits of arbitration awards; and (4) courts should enforce arbitration awards which are not absolutely beyond the pale. The grievance and arbitration machinery is at the heart of a system of industrial self-government and the system will not function with inappropriate judicial interference. *See* United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See generally* Benjamin Aaron, *Arbitration in the Federal Courts; Aftermath of the Trilogy*, 9 UCLA L. REV. 360 (1962); Benjamin Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967); William B. Gould IV, *Judicial Review of Labor Arbitration Awards Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

124. Vaca v. Sipes, 386 U.S. 171 (1967), made clear that preliminary judicial determination of the question of the union's breach of its duty will therefore frequently be required before the section 301 suit against the employer can proceed.

would miss, but that the arbitrator should of course decide the case on the merits (fair);

(f) the union assigns a novice attorney to handle the arbitration hearing knowing (not knowing?) that employer counsel is experienced (fair);

(g) union counsel declines to call grievant as a witness at the arbitration hearing because counsel sincerely believes grievant's testimony would be self-destructive (fair);

(h) union counsel advises the arbitrator off (on?) the record that the case lacks merit but nevertheless vigorously presents grievant's position at the hearing (fair);

(i) union counsel declines to awaken the arbitrator who falls asleep during grievant's direct examination (fair);

(j) union counsel visibly irritates the arbitrator by strenuously objecting to employer counsel driving the arbitrator to the airport (fair);

(k) union counsel declines to file a post-hearing brief or make closing argument at the hearing although employer counsel does both (fair).

National labor policy has long been predicated upon the assumption that workforce improvement in wages, hours, and terms and conditions of employment, and thereby labor peace, would be achieved through a collective bargaining system which necessarily encompassed strong unions.[125] Protection of collective employee organizational and representational rights was predominant. Individual interests were relevant but subservient to majoritarian principles. Combination, informed by the overriding concept of unity of interest, was the touchstone.[126]

Exclusivity principles give the union awesome power to control the working lives and fortunes of the entire bargaining unit, balanced, says

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125. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967): ("National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.") *See also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 42 (1937). *See generally* IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY (1950).

As stated in NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962), the NLRA was designed in part to protect "concerted activities . . . to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours."

126. *See generally* FOSTER RNEA DULLES, LABOR IN AMERICA: A HISTORY (3d ed. 1966); HARRY A. MILLIS & ROYAL E. MONTGOMERY, ORGANIZED LABOR (1945); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (1987); NELL I. PAINTER, STANDING AT ARMAGEDDON, THE UNITED STATES, 1877-1919 (1987); SELIG PERLMAN, HISTORY OF TRADE UNIONISM IN THE UNITED STATES (1922); SELIG PERLMAN & PHILLIP TAFT, HISTORY OF LABOR IN THE UNITED STATES 1896-1932 (1935).

national labor policy, by the duty of fair representation. Yet that duty demands neither reasonableness nor fairness, merely lack of hostility, and tolerates negligence. Moreover, the arbitral remedy is essentially nonreviewable and preclusive. Collective bargaining processes, including union coffers, must not be unduly burdened, answers national labor policy, again somewhat unsatisfactorily, particularly for the nonconsenting minority.

Implementing the perceived congressional scheme, the Supreme Court, particularly the Warren Court,[127] has repeatedly underscored the wide discretion and limited exposure to be accorded unions. The focus has not been upon employer mistreatment but rather union response. *Vaca* thus emphasized, for example, that the question was not whether the evidence supported the employee's assertion that he had been wrongfully discharged by the employer, but whether the union acted arbitrarily, discriminatorily, or in bad faith in declining to arbitrate.[128]

While collective bargaining has been at the core of national labor policy for the private sector,[129] only one-fifth of the private sector workforce is unionized.[130] With due regard to the limitations and failures

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127. *See generally* Lee M. Modjeska, *Labor and the Warren Court*, 8 INDUS. REL. L.J. 479 (1986).

128. The Court stated:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.

Vaca v. Sipes, 386 U.S. 171, 193 (1967).

129. Congressional endorsement of collective bargaining principles was further reflected in recognition of organizational-bargaining rights for federal sector employees in Title VII of the Civil Service Reform Act of 1978. 92 Stat. 1111, 5 U.S.C. §§ 7101-7903 (1982). Congress there declared that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a) (1982). *See* Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89 (1983). Many of the states made similar determinations concerning the desirability of collective bargaining in the public sector. *See generally* HARRY T. EDWARDS, R. THEODORE CLARK & CHARLES B. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR - CASES AND MATERIALS (3d ed. 1985).

130. *Union Membership Down to 16.1 Percent*, 136 (BNA) LAB. REL. REP. 174 (Feb. 18, 1991). Labor's ostensible decline is attributed to various factors including a changing workforce, evolution of a service and distribution economy, domestic and global competition, management antiunionism, union apathy and organizational ineptness, NLRB and other governmental bias, and a resurgent spirit of individualism. *See generally* James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841 (1985); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633; Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986); A.H. Raskin, *Organized Labor - A Movement in Search of a Mission: Implications for Employers and Unions*, 3 THE LABOR LAWYER 41 (1987); Theodore J. St. Antoine, *National Labor Policy: Reflections and Distortions of Social Justice*, 29 CATHOLIC U.L. REV. 535 (1980); Paul Weiler, *Promises to Keep:*

of collective bargaining generally,[131] therefore, if not also within that unionized sector, courts and legislatures have increasingly sought to fill the gaps with protective labor doctrine.[132] Judicial and legislative erosion of employment at will doctrine, for example, has provided civil causes of action for wrongful discharge of nonunionized employees.[133]

In theory, a fundamental reason for and benefit of unionism is employee protection against arbitrary management.[134] Not long ago the generality reigned that management could discipline or discharge for good cause, bad cause, or no cause at all. The New Deal and its progeny of social legislation made some inroads on this doctrine of unfettered management by proscribing certain forms of discrimination (*e.g.*, race, sex, union activity). A major inroad, and concomitant breakthrough for industrial due process, appeared to come with union success in negotiating "just cause" requirements into labor contracts. In fact, however, as has been seen, employer just cause is frequently not the touchstone, rather the legitimacy of the union decision not to challenge that employer cause.

Under evolving employment law jurisprudence, predominately state based, growing numbers of unrepresented employees have significant avenues of civil recourse against their employers for unjust treatment

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Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769 (1983).

131. *See generally* THOMAS A. KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986).

132. *See* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 10-11 (1988):

> Why collective bargaining has not been more widely extended is, for present purposes, unimportant. The significant fact is that collective bargaining does not regulate the labor market. Unions and collective agreements do not guard employees from the potential deprivations and oppressions of employer economic power. The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party. The law, either through the courts or the legislatures, will become the guardian. Labor law is now in the midst of that changing of the guard. There is current recognition that if the majority of employees are to be protected, it must be by the law prescribing at least certain rights of employees and minimum terms and conditions of employment.

See generally PAUL C. WEILER, GOVERNING THE WORKPLACE; THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990); Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half-Century*, 61 CHI. KENT L. REV. 631 (1985).

133. *See generally* ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE (1987); WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES (1985); LEX K. LARSON, UNJUST DISMISSAL (1988); HARRY H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE (2d ed. 1987).

134. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031, 1047 (7th Cir. 1987), *rev'd*, 486 U.S. 399 (1988): "[O]ne of the major recruiting points of union organizers [is] that unionization would protect the worker against arbitrary discharge."

(*e.g.*, wrongful discharge, sexual harassment). Recourse is generally available without contractual or other exhaustion requirements, and remedial relief is frequently broad, including compensatory and punitive damages. While there is hardly national uniformity in this burgeoning crazy quilt of employment law, substantial protection is emerging for the unrepresented/nonunion sector.

Evolving unjust treatment law does not benefit the represented employee. Section 301 generally preempts claims arising under (i.e., just cause) or otherwise entailing the labor contract. One hard question concerns, the fairness of this ostensible disparity. Limited arbitral remedies, such as reinstatement and mitigated back pay, pale before the huge compensatory and punitive damage awards noted in the civil advance sheets. Further, no union agent holds the key to the courthouse door.

Conversely, formal, costly, cumbersome, and protracted court litigation is arguably no substitute for the informal, inexpensive, simple, and expeditious relief available under the grievance and arbitration procedures contained in most collective bargaining agreements. Further, the labor arbitrator - not the court - has expertise concerning the multifaceted dimensions of the employment community and the common law of the shop. As Justice Douglas once noted, "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[135] Perhaps again one is driven back to the concept that assuming processes work fairly and efficiently, the greatest good for the greatest number is derived from collectivism not individualism.

It is interesting to compare the nonexclusivity and nonpreclusivity of contractual grievance-arbitration remedies under analogous social legislation. The statutory right of an employee to a trial *de novo* under Title VII of the Civil Rights Act of 1964,[136] for example, may not be

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135. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

136. 42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer, employment agency, or labor organization to engage in employment discrimination against any individual because of such individual's race, color, religion, sex, or national origin. The nondiscrimination prohibitions of Title VII apply to private and to public sector employment, including federal employment. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Chandler v. Roudebush, 425 U.S. 840 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Central administrative authority for the administration of Title VII with regard to private sector and state and local public sector employment is generally vested in the Equal Employment Opportunity Commission (EEOC). Title VII provides that the EEOC is to endeavor to resolve meritorious charges of unlawful employment practices within its jurisdiction by the informal methods of conference, conciliation, and persuasion. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). If conciliation fails, the aggrieved party, or the EEOC (in regard to charges of unlawful employment practices in the private sector), or the attorney general (in regard to charges of unlawful employment

foreclosed by the prior submission of the claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement.[137] A prior arbitral decision neither forecloses an individual's right to sue nor divests the federal courts of jurisdiction.

Employment discrimination claims may be pursued in several forums, and parallel or overlapping remedies are contemplated. Title VII supplements, and does not supplant, other laws and institutions relating to employment discrimination. The contractual and statutory rights have legally independent origins and vindicate different policies, and both rights are available to an aggrieved employee.

Nor is an employee's submission of a grievance to arbitration regarded as a waiver of his cause of action under Title VII. The Supreme Court, in *Alexander v. Gardner-Denver*, said that "[a]lthough presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."[138] The decision of the arbitrator may be admitted into evidence in the Title VII action, and may be given such weight as the court in its discretion deems appropriate.[139] As summarized by the *Gardner-Denver* Court:

> [t]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[140]

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practices in the state and local public sector) may bring a *de novo* civil action in federal district court. *See* Occidental Life Ins., Co. v. EEOC, 432 U.S. 355, 359-60 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). *See also* Yellow Freight System, Inc. v. Donnelly, 110 S. Ct. 1566, 1567 (1990) (state courts have inherent authority and presumptive competence to exercise concurrent jurisdiction over Title VII actions). The EEOC has no independent adjudicatory or enforcement authority.

General administrative authority over discrimination in federal employment is also vested in the EEOC. The EEOC is given the authority to enforce the federal government nondiscrimination prohibitions through appropriate remedial action, including hiring or reinstatement with back pay. A federal government employee or applicant aggrieved by the disposition of a discrimination complaint by a government agency (resort to the EEOC from the employer agency is optional) or the EEOC may bring a *de novo* civil action in federal district court. *See* Brown v. GSA, 425 U.S. 820, 829-32 (1976).

137. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974).

138. *Id.* at 52.

139. *Id.* at 60, n.21.

140. *Id.* at 59-60. The statutory period for filing a claim with the EEOC is not tolled during the pendency of grievance or arbitration procedures under a collective bargaining contract. International Union of Elec., Radio & Machine Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 237-38 (1976). *See generally* Edwards, *Arbitration of*

While a union might waive particular statutory rights related to collective activity (*e.g.* strikes),[141] said the *Gardner-Denver* Court, Title VII rights concern not majoritarian processes, but individual equal opportunity, and are not waiveable. Moreover, neither arbitrators nor arbitral fact-finding processes were as appropriate as judicial processes for final resolution of Title VII issues. Arbitrators have expertise in shop, not public law,[142] and arbitral evidentiary and procedural rules are lax.[143]

Further concern with arbitral preclusivity arose from the union's exclusive control over the grievance-arbitration process, the potential subordination of individual to collective interests, and the difficulty of establishing breach of the duty of fair representation. The Court thought it noteworthy that Congress extended Title VII protection against union as well as employer practices.

Similarly, the Supreme Court held in *Barrentine v. Arkansas-Best Freight System, Inc.*,[144] that an employee could bring a wage claim in federal court under the Fair Labor Standards Act (FLSA),[145] notwithstanding prior unsuccessful submission of the claim to a joint grievance committee under the labor contract. Applying *Gardner-Denver* principles, the Court found that the FLSA rights arose independent of the collective-bargaining process, and devolved on employees "as individual workers, not as members of a collective organization."[146] Accordingly, the rights were not waiveable and were better protected in a judicial forum. The Court stated:

Employment Discrimination Cases: A Proposal for Employer and Union Representatives, 27 LAB. L.J. 265 (1976); Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. No. 3, 49 (1984). Bernard D. Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. CHI. L. REV. 724 (1976).

141. "These rights are conferred on employees collectively to foster the processes of bargaining," said the Court, "and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members." Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974). Title VII rights to equal employment were no part of such collective bargaining process.

142. The arbitrator's "task is to effectuate the intent of the parties rather than the requirements of enacted legislation." Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974). Where the contract and Title VII conflict, "the arbitrator must follow the agreement." *Id.* at 57.

143. "Indeed," said the Court, "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Id.* at 58. To permit employees to pursue fully both contract and court remedies also facilitates settlement.

144. 450 U.S. 728 (1981).

145. 29 U.S.C. §§ 201 *et seq.* (1982).

146. Berrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 745 (1981).

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.[147]

As in *Gardner-Denver*, the Court stressed that grievance-arbitration preclusion could result in forfeiture of statutorily protected rights because fair representation doctrine tolerated union failure to process even meritorious claims,[148] and arbitral incompetence or lack of contractual authority to evaluate public law considerations.[149]

Further, in *McDonald v. City of West Branch*,[150] the Supreme Court held that arbitration awards were entitled to neither res judicata nor collateral estoppel effect in civil rights actions under 42 U.S.C. § 1983.[151] "[A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard."[152]

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147. *Id.* at 737.

148. *Id.* at 742. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987). *See generally* William B. Gould IV, *Judicial Review of Labor Arbitration Awards: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989); Bernard D. Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 IND. REL. L.J. 241 (1988).

149. The Court noted as follows:

> Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available, . . . a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 742 (1981).

150. 466 U.S. 284 (1984).

151. 42 U.S.C. § 1983 (1982) accords a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The statute reaches federal statutory and constitutional claims. *See* Felder v. Casey, 487 U.S. 131 (1988); Maine v. Thiboutot, 448 U.S. 1 (1980). Relief is available where the statute creates specific identifiable federal rights intended to benefit the putative plaintiff and Congress has not expressly foreclosed relief. *See* Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418 (1987); Smith v. Robinson, 468 U.S. 992, 1009-13 (1984); Middlesex County Sewage Auth. & Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981). *See generally* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

152. 466 U.S. at 290.

Granted that Title VII, FLSA, and § 1981 analogies entail accommodation of congressional schemes, the policy considerations which underlay the Court's nonexclusivity determinations hardly seem confined to statutory interpretation principles. Arbitral and fair representation limitations and deficiencies arguably transcend particular claims. With due regard to the unpopularity of the thought, one does occasionally wonder whether aspects of exclusivity/fair representation doctrine have become unnecessarily harsh on the individual employee. The inquiry seems especially warranted in discharge and discipline cases entailing the most fundamental of civil rights to and in employment.